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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTONIO FUENTES,

Defendant and Appellant.

G051066

(Super. Ct. No. 02WF2616)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

C. Matthew Missakian, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Jose Antonio Fuentes appeals the trial court's order denying his nonstatutory postjudgment motion to vacate his November 2003 guilty plea to the sale or

transportation of more than approximately an ounce of cocaine, i.e., more than 28.5 grams. (Health & Saf. Code, § 11352, subd. (a); see Pen. Code, § 1203.073, subds. (a) & (b)(1) [prohibiting probation for possession for sale or transportation of more than 28.5 grams of cocaine, except "in an unusual case where the interests of justices would best be served"].) The sentencing court in January 2004 found Fuentes's circumstances qualified as the requisite "unusual case" (*ibid.*), granted Fuentes probation, and he served 363 days in the county jail. After he successfully completed probation, he withdrew his guilty plea and gained dismissal of the charge (Pen. Code, § 1203.4), expunging it from his record.

He thereafter led a crime-free life as a husband and father of two children, still working for the same employer who appeared at the courthouse for Fuentes's original 2003 trial date, expecting him to plead not guilty, until "enormous [personal] pressure" related to his daughter's impending birth resulted in Fuentes's plea.[1] Neither of Fuentes's retained attorneys advised him of any negative immigration consequences of his plea; indeed, one assured him his probation sentence of less than a year eliminated any concerns about deportation.

Nearly 10 years later, however, federal immigration officials served him with a notice to appear for removal proceedings based on his 2003 conviction. Fuentes attempted in his motion below to vacate his guilty plea, but the trial court found it was not enough that Fuentes established a violation of his Sixth Amendment right to counsel (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)) based on both failure to advise him of his plea's consequences and affirmative misadvice on the purported immigration safe harbor of his 363-day sentence. The court concluded it lacked jurisdiction to grant Fuentes's motion because his brief, successful stint in constructive custody on probation had long expired, so the predicate for a writ of habeas corpus or similar relief was absent.

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[1] Fuentes's codefendant told the defense investigator that Fuentes "had no involvement in the charged offense and would so testify."

Our Supreme Court has "decline[d]" to conclude "some form of postconviction remedy is necessary to ameliorate the harshness of the situation in which fundamental constitutional violations have occurred but will go unremedied because the offender is now out of custody and unable to seek relief on habeas corpus." (*People v. Kim* (2009) 45 Cal.4th 1078, 1105-1107 (*Kim*) [ineffective assistance of counsel in immigration context is a mistake of law, not fact, for which there is only limited redress that must be quickly secured or is forfeited, absent a gubernatorial pardon].)

Fuentes points to an evident paradox in which the shorter a deserving defendant's custody term is, the greater his or her risk for catastrophic and irreparable immigration consequences. And the better plea deal an attorney negotiates — and the more satisfied and unlikely a client is to immediately withdraw the plea or appeal the conviction — the greater the trap for the unwary who rely on the misadvice of lawyers.

Fuentes argues *Kim* was wrongly decided because trial courts may, through "inherent equitable power" or based on due process, provide relief where a defendant's right to effective assistance of counsel has been violated, though the defendant is no longer in custody. Put another way, Fuentes contends his postjudgment motion "should have been granted because the absence of any procedural means to assert a substantive constitutional right would violate [his] rights under the Sixth and Fourteenth Amendments." As we explain, *Kim* forecloses Fuentes's claim that the courts must craft a constitutional remedy in the circumstances here, and we are bound by that conclusion. (*Kim*, *supra*, 45 Cal.4th at p. 1105; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

Fuentes attempts to distinguish *Kim*, but as we explain, the recent enactment of Assembly Bill 813, codified at section 1473.7 of the Penal Code, undercuts his claim that the judiciary must fashion a means of postconviction relief. As explained in the Legislative Counsel's Digest, this new enactment, signed by the governor on September 28, 2016, "create[s] an explicit right for a person no longer imprisoned or

restrained to prosecute a motion to vacate a conviction or sentence based on a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere . . . ." Consequently, we affirm the trial court's denial of Fuentes's motion under then-existing law, but without prejudice to his right to file a new motion for relief under newly-enacted section 1473.7.

I

DISCUSSION

Because reliance on an attorney's deficient or incorrect advice is a mistake of law rather than fact (*Kim, supra*, 45 Cal.4th at pp. 1102-1107), the underlying facts pertinent to Fuentes' immigration predicament are irrelevant under *Kim*, and we therefore turn immediately to Fuentes's attempts to distinguish *Kim*. They fail.

Fuentes notes that in *Kim* the defendant initiated postjudgment proceedings by filing a writ of *coram nobis* seeking relief based on his attorney's failure to advise him of the immigration consequences of his plea, while Fuentes instead filed what he designated as a nonstatutory "Motion to Vacate" his plea. The Supreme Court explained that a writ of *coram nobis* is only available to correct previously undiscovered errors of fact, not errors of law, and declined to expand the writ to remedy the dilemma of an immigrant defendant who receives constitutionally defective legal advice about the deportation consequences of his or her plea. (*Kim, supra*, 45 Cal.4th at pp. 1103-1107.)

Fuentes acknowledges the Supreme Court stated in *Kim* that "a nonstatutory motion to vacate has long been held to be the legal equivalent of a petition for writ of error *coram nobis*" (*Kim, supra*, 45 Cal.4th at p. 1096), but he argues "[t]his statement is not entirely accurate." He relies on a more precise formulation in which one court observed, "Every petition for a writ of error *coram nobis* is a motion to vacate judgment, but the converse is not true." (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1526.) But *Kim* is nevertheless dispositive because it held *no* "form of postconviction

remedy," whether under *coram nobis* or otherwise, is necessary or available to redress an attorney's inadequate or erroneous immigration advice when the period for seeking habeas corpus or other existing means of relief has passed. (*Kim*, *supra*, 45 Cal.4th at pp. 1105-1109.)

The *Kim* court explained its view that immigrant "defendants have ample opportunities to challenge the correctness of the judgments against them," as follows: "They are of course provided attorneys to defend them and are guaranteed the right to a jury trial. Following a plea or conviction, a defendant can move to withdraw a plea, or can appeal a judgment of conviction and then if necessary seek discretionary review in this court. Having exhausted those avenues of potential relief, the defendant during the time of actual or constructive custody can file a petition for a writ of habeas corpus in an appropriate court." (*Kim*, *supra*, 45 Cal.4th at pp. 1105-1106, fns. omitted.) According to Fuentes, "None of these remedies has any real chance of correcting the constitutional violation that occurs when a defendant pleads guilty in reliance on incorrect advi[c]e about immigration consequences."

The remedies are not available to Fuentes because his brief sentence and probation period concluded years before federal authorities initiated his deportation, and only then did he learn his lawyers gave him incorrect legal advice on the immigration consequences of a guilty plea. It is not clear whether the relevant state and federal agencies typically coordinate quickly enough for federal officials to begin deportation proceedings while an offender sentenced to probation is still in custody. Fuentes was only cited for removal almost nine years after his plea when he returned through customs at the Los Angeles International Airport after a brief trip.

In any event, the *Kim* court also suggested expungement as a potential remedy for defendants who obtain probation (*Kim*, *supra*, 45 Cal.4th at p. 1106; Pen. Code, § 1203.4), but that appears to be of limited utility, if any, based on Fuentes's experience here. The court also noted the option of "a pardon from the Governor" (*Kim*,

at p. 1106), though the likely prospects of obtaining relief are remote. The *Kim* court concluded, "In short, criminal defendants do not lack reasonable opportunities to vindicate their constitutional rights [including effective assistance of counsel] or otherwise [to] correct legal errors infecting their judgments." (*Ibid.*)

The court deferred to the Legislature if "these established remedies have proved inadequate," to "enact[] statutory remedies to fill the void."[2] (*Kim*, *supra*, 45 Cal.4th at p. 1106.) Fuentes argues the courts have a duty independent of the Legislature to protect constitutional rights, particularly because a year after *Kim* was decided, the United States Supreme Court in *Padilla v. Kentucky* (2010) 559 U.S. 356, 374-375 (*Padilla*) held for the first time that incorrect advice about the immigration consequences of a criminal conviction can constitute ineffective assistance of counsel under the Sixth Amendment. Fuentes contends, "The existence of a substantive constitutional right implies the necessity for some procedural means to assert that right," and he argues "California's procedural rules [erect] an effective bar to asserting a federal constitutional right, and thereby nullify a significant aspect of the Sixth Amendment."

Fuentes acknowledges the high court in *Chaidez v. United States* (2013) __ U.S. __, 133 S.Ct. 1103, 1110, determined *Padilla* is not retroactive because applying the *Strickland* standard to the collateral consequences of a guilty plea broke new ground and announced a rule imposing a new obligation on defense counsel. But Fuentes asserts *Padilla*'s nonretroactivity has no bearing on his case because the California Supreme Court held "affirmative misadvice" about immigration consequences "was a constitutional violation even prior to *Padilla*." (See *In re Resendiz* (2001) 25 Cal.4th

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[2] The court affirmed that section 1016.5, which affords a statutory remedy for a defendant to withdraw his or her plea when *the trial court* fails to advise the plea may have immigration consequences, does not apply when the defendant's attorney incorrectly explains the court's general advisement does not apply to his or her circumstances. (*Kim*, *supra*, 45 Cal.4th at pp. 1107-1108, fn. 20, citing *People v. Chien* (2008) 159 Cal.App.4th 1283 [ineffectiveness of counsel claim is not cognizable in a motion to vacate under § 1016.5].)

230, 235 (*Resendiz*).) Fuentes also attempts to distinguish on various grounds several Court of Appeal cases holding that even after *Padilla*, *Kim* remains controlling. (*People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1145, 1148; *People v. Shokur* (2012) 205 Cal.App.4th 1398, 1405; see also *People v. Gari* (2011) 199 Cal.App.4th 510, 520-522 [*Kim* affords only narrow grounds for relief based on immigration consequences].)

We too agree *Kim* remains controlling. The simplest reason is that even though Fuentes is correct that the court in *Resendiz* held before *Padilla* that misadvice may constitute ineffective assistance of counsel, the court in *Kim* nevertheless determined unequivocally that nothing more is required when, as here, the window for asserting existing procedural safeguards and remedies has passed. We are bound by that conclusion. (*Auto Equity*, *supra*, 57 Cal.2d at p. 455.)

Fuentes also argues that because the Supreme Court decided *Kim* on alternative grounds, its rejection of the defendant's "Proposed Expansion of *Coram Nobis*" to remedy mistakes of law based on ineffective assistance of counsel was only dictum. (*Kim*, *supra*, 45 Cal.4th at pp. 1104-1109.) True, the court first found the defendant's petition forfeited and procedurally barred because he had not been diligent in filing it, failed to avail himself of habeas corpus as an adequate legal remedy (federal officials commenced his deportation trial while he was still in state custody), and engaged in piecemeal litigation of his claims. (*Ibid.*)

But the court held that "[e]ven were we to overlook the procedural flaws in defendant's application" (*Kim*, *supra*, 45 Cal.4th at p. 1101), no additional remedy was required to redress a mistake of law based on ineffective assistance of counsel discovered long after the fact. (*Id.* at p. 1107.) Consequently, we agree with the Attorney General that the court's alternate holding was not dictum. "It is well settled that where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the

other. The ruling on both grounds is the judgment of the court and each is of equal validity." (*Bank of Italy etc. Assn. v. Bentley* (1933) 217 Cal. 644, 650.)

We asked the parties to address in supplemental briefing whether the absence of expungement as a viable remedy alters *Kim*'s value as precedent for this case. *Kim* had noted that among "ample opportunities to challenge the correctness of judgments against them," criminal defendants "may in some circumstances" after completing probation have their conviction expunged by "petition[ing] the trial court to withdraw a guilty plea and enter a not guilty plea or set aside a verdict of guilty and have the matter dismissed." (*Kim*, *supra*, 45 Cal.4th at pp. 1105-1106.) Conceivably, *if* the *Kim* court believed expungement served as at least a limited protection to nullify bad or nonexistent attorney advice concerning the immigration consequences of a plea, and that assumption proved incorrect, it might undercut *Kim*'s precedential value.

It appears expungement had little effect on immigration consequences when *Kim* was decided, and none now. Filed the same month as *Kim*, a Ninth Circuit case explained that, "[g]enerally, expungement of convictions under state rehabilitative statutes does not negate the immigration consequences of the conviction." (*Estrada v. Holder* (9th Cir. 2009) 560 F.3d 1039, 1040, overruled on other grounds in *Madrigal-Barcenas* (9th Cir. 2015) 797 F.3d 643, 644.)

A limited exception applied under the Federal First Offender Act (18 U.S.C. 3607), under which a resident alien who expunged a simple drug possession offense in state court could avoid removal "provided they would have been eligible for relief under the Act had their offenses been prosecuted as federal crimes." (*Lujan – Armendariz v. INS* (9th Cir. 2000) 222 F.3d 728, 749.) But under changes to the Act's definition of "conviction," the Ninth Circuit in 2011 held, "After our decision today, alien defendants will know that an expunged state-law conviction for simple possession *will* have adverse immigration consequences." (*Nunez-Reyes v. Holder* (9th Cir. 2011) 646 F.3d 684, 693, original italics.) This holding was prospective only, and the parties do

not identify whether Fuentes's conviction, for which he obtained expungement well before 2011, qualified for relief under the former rule. It very likely did not, based on the fact both parties confirm a removal hearing is still scheduled, though not until November 2019.

But we conclude expungement's inefficacy does not alter *Kim*'s precedential value because, simply put, *Kim* contemplated as much. The court expressly stated that if "these established remedies have proved inadequate," it is for the Legislature to "enact[] statutory remedies to fill the void." (*Kim*, *supra*, 45 Cal.4th at p. 1106.) As noted, we are bound by this conclusion and, like the trial court, may not step in to craft a judicial remedy where the high court refused to do so.

Fortunately for Fuentes, as noted at the opinion's outset, the Legislature recently enacted section 1473.7. It expressly provides: "A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence" for one of two reasons, including that "[t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1437.7, subd. (a).) The motion must be made with "reasonable diligence" *after* the party receives notice of pending immigration proceedings or a removal order. (*Id.*, subd. (b).) The court must hold a hearing on the motion, and if the moving party establishes by a preponderance of the evidence that he or

she is entitled to relief, the court must allow the person to withdraw his or her plea. (*Id.*, subd. (e).)[3]

The enactment of section 1437.7 in essence provides Fuentes the means to obtain the relief he sought in the trial court, namely to withdraw his guilty plea. He argues the courts also have "inherent equitable power" to craft relief where the Legislature has failed to do so because "some remedy must be available" to avoid

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[3] In full, section 1437.7, states: "(a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons: [¶] (1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere. [¶] (2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

"(b) A motion pursuant to paragraph (1) of subdivision (a) shall be filed with reasonable diligence after the later of the following: [¶] (1) The date the moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal. [¶] (2) The date a removal order against the moving party, based on the existence of the conviction or sentence, becomes final.

"(c) A motion pursuant to paragraph (2) of subdivision (a) shall be filed without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section.

"(d) All motions shall be entitled to a hearing. At the request of the moving party, the court may hold the hearing without the personal presence of the moving party if counsel for the moving party is present and the court finds good cause as to why the moving party cannot be present.

"(e) When ruling on the motion: [¶] (1) The court shall grant the motion to vacate the conviction or sentence if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a). [¶] (2) In granting or denying the motion, the court shall specify the basis for its conclusion. [¶] (3) If the court grants the motion to vacate a conviction or sentence obtained through a plea of guilty or nolo contendere, the court shall allow the moving party to withdraw the plea.

"(f) An order granting or denying the motion is appealable under subdivision (b) of Section 1237 as an order after judgment affecting the substantial rights of a party."

"nullify[ing]" the Sixth Amendment. Phrased in terms of due process, he contends, "The existence of a substantive constitutional right implies the necessity for some procedural means to assert that right" and, if the right "can not be asserted through any existing procedural vehicle, then some *new* procedural means must be established to give force to the Constitution." As discussed, *Kim* forecloses a judicial remedy. But the Legislature now has created a new procedural means of relief in section 1473.7, and nothing suggests it is inadequate or unavailing to afford Fuentes the opportunity he seeks to withdraw his plea on Sixth Amendment grounds.[4]

II

DISPOSITION

The trial court's order rejecting defendant's nonstatutory motion to vacate his conviction and withdraw his plea is affirmed, but without prejudice to Fuentes's right to file a motion for relief under newly-enacted Penal Code section 1473.7.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.

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[4] In supplemental briefing, defendant requests that we reach and resolve potential issues including whether section 1473.7 applies retroactively. He asserts the statute applies retroactively, and the Attorney General similarly agrees the new statute renders the appeal moot because it affords defendant the relief he seeks. Because judicial estoppel would preclude the Attorney General from changing positions if defendant seeks relief below, we decline defendant's invitation to decide hypothetical issues. Any such issues must await an actual case or controversy.